Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48905/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2016	**On 27th May 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAMID ALI KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr Z Miah, solicitor

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Afghanistan born on 5th May 1986. His appeal against the Respondent's decision of 17th November 2014 to refuse to grant leave to remain in the UK as a Tier 4 (General) Student under paragraph 245ZX of the Immigration Rules, and the decision to remove him from the UK under Section 47 of the Immigration, Asylum and Nationality Act 2006, was allowed on Article 8 grounds by First-tier Tribunal Judge Jackson in a decision promulgated on 19th November 2015.

2. The Respondent appealed against the decision on two grounds. Firstly, the judge found that the Appellant could not satisfy the Immigration Rules because his bank statements did not show the required level of funds for the 28-day period and therefore the judge was unable to take into account evidence submitted post-application. However, in allowing the appeal under Article 8 the judge found that the Appellant could in substance meet the Immigration Rules on the basis of bank statements post-dating the application. This was a clear failure on the part of the judge to have regard to the requirements of specified evidence and therefore the judge had misdirected himself in law.

3. Secondly, the judge failed to give adequate reasons for allowing the appeal on Article 8 grounds. In finding that the substance of the Immigration Rules were met, the judge failed to accord due weight to the public interest. The Appellant did not meet the Immigration Rules and disruption to the Appellant's studies did not render the decision to remove him disproportionate. The judge's failure to identify further reasons for allowing the appeal was perverse.

4. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 16th March 2016 on the basis that it was arguable that the judge had erred in allowing the appeal on human rights grounds having dismissed the appeal under the Immigration Rules.

The Judge's Findings

5. The judge's findings are set out at paragraphs 16 to 21 of the decision. The judge found that the Appellant's appeal failed under the Immigration Rules because she was unable to take into account the further evidence submitted by the Appellant and there was no dispute that the bank statements submitted for the relevant period did not show that the required level of funds were held for 28 days.

6. The judge then went on to consider the Appellant's appeal outside the Immigration Rules on Article 8 grounds. The judge accepted that the Appellant was relying only on his private life established here as a student. He found that there was interference, but it was in accordance with the law and the legitimate aim of protecting the economic wellbeing of the country. The judge then went on to assess proportionality.

7. The judge made the following findings at paragraph 19 to 21:

> "19. The final question under Article 8 is whether the Appellant's removal would be a disproportionate interference with his right to respect for private life. When undertaking the balancing exercise I take into account the limited utility of Article 8 in private life cases as set out in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 and Nasim and Others (Article 8)

[2014] UKUT 00025 IAC and also the factors in Section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest and little weight is to be attached to private life established at a time when a person's immigration status is precarious which the Appellant's has always been as he has had only limited leave to remain. However, the public interest in immigration control in this case has to be reduced given that the Appellant can in substance meet the requirements of having sufficient funds to maintain himself for the remainder of his course. His more recent bank statements show more than sufficient funds and he has already paid his tuition fees for his final year. The public interest in removing an Appellant who is self-sufficient, who speaks English and who has a good immigration history in the present circumstances is far less than in other cases.

20. The Appellant would be returning to Afghanistan or Pakistan, most likely the latter where his family are currently based and could potentially make an application for entry clearance to return to finish his course in the United Kingdom, although this would entail additional cost and delay to completion of his degree and it is unknown as to whether he could defer the final part of his last year to do so.

21. In this case the question of whether the Appellant's removal from the United Kingdom is disproportionate to the legitimate aim is a finely balanced one given that there is little strength in the public interest side of the equation on the facts of this case. Overall, I find that the Appellant's removal from the United Kingdom prior to the end of his current course of study expected to be completed in June 2016 would be a disproportionate interference with his right to respect for private life contrary to Article 8 of the European Convention on Human Rights. There is no risk to the public purse in this case given the Appellant's financial resources and on the opposing side there would be significant disruption to him in not being able to complete his course as planned now. In the circumstances, this case can be distinguished from the circumstances in Nasim where former students simply desired to continue a private life by undertaking post-study work. Here, the Appellant desires only to complete his course for which he has a matter of months remaining which he has substantially done so far and there are reasons to reduce the public interest in removal. I therefore allow the appeal on human rights grounds."

Submissions

8. Mr Tufan relied on the case of Patel in particular at paragraph 57 which states:

> "It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Lord Justice Sedley's call in Pankina for common sense in the application of the Rules to graduates who have been studying in the UK for some years (see paragraph 47 above). However, such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

9. Mr Tufan also relied on the case of Chau Le (Immigration Rules - de minimis principle) [2016] UKUT 00186 (IAC). Mr Tufan produced a copy of the headnote which states:

> "The de minimis principle is not engaged in the construction or application of the Immigration Rules. Properly analysed, it is a mere surrogate for the discredited 'near miss' or 'sliding scale' principle."

10. Mr Tufan submitted that this case was a near miss argument. There must be compelling circumstances in order for the judge to conduct an Article 8 assessment outside the Immigration Rules. The judge had failed to comply with Singh and had failed to say what the compelling circumstances were in this case. He relied on the grounds of appeal.

11. On behalf of the Appellant, Mr Miah submitted that this case was a near miss as to the availability of documents not actually the availability of funds. The judge was correct to consider Article 8 outside the Immigration Rules for the reasons she gave at paragraphs 3 to 6 of her decision in which she refers to MM (Lebanon) v Secretary of State [2014] EWCA Civ 985:

> "3. … That the proportionality test will remain relevant in cases where the Immigration Rules do not provide a complete code for dealing with a person's Convention rights and the proportionately assessment under Article 8 would remain relevant in such cases.
>
> 4. Following this, the High Court has, in cases of R (Ganesabalan) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin) and R (Aliyu) v Secretary of State for the Home Department [2014] EWHC 3919 (Admin) found that where the Immigration Rules do not provide a complete code (such as in deportation cases), the Secretary of State is always under a duty to consider the exercise of discretion outside the Rules which will involve applying the proportionality test by reference to Article 8 without any threshold test for doing so. However the nature and

> extent of the consideration required will depend on factors including the extent to which the individual's circumstances have been taken into account under the Immigration Rules and if so the reasons are likely to be more briefly stated."

The judge then set out the five-stage test in Razgar and in paragraph 6 set out paragraphs 20 and 21 of the case of Nasim.

12. Mr Miah submitted that the judge had therefore appropriately directed herself in considering Article 8 outside the Immigration Rules and her conclusion that, on the particular facts of this case, the Appellant's removal was disproportionate, was one which was open to her on the evidence. The Appellant stated that he had been allowed to continue studying whilst his appeal had been pending and his last exam was on 18th May 2016. He expected his results at the end of June 2016 and the graduation ceremony in July. He therefore requested that his leave be extended at least so that he would be able to complete his course and attend the graduation.

Findings and Conclusions

13. Mr Tufan essentially makes two points. The first point is that relied on in the grounds of appeal and the second point is that the judge in any event should not have gone on to look at Article 8 given that the Appellant could not satisfy the Immigration Rules and there were no compelling circumstances justifying consideration of Article 8 outside the Immigration Rules.

14. I will deal with the second point, first. It is clear from paragraphs 3 to 6 of the judge's decision that she properly directed herself in law and that, following the case law which was set out therein, the judge was entitled to look at Article 8 outside the Immigration Rules. The judge's approach to the appeal therefore did not disclose an error of law. She quite rightly considered first whether the Appellant could satisfy the Immigration Rules and found that he could not because he was unable to show that he had the required level of funds for 28 days.

15. However, in looking at Article 8 the judge was entitled to look at all the circumstances appertaining at the date of decision. She was therefore able to take into account the Appellant's explanation. The reason he was unable to show the required funds for the 28-day period was that he had to return to Pakistan because of family difficulties and he therefore had problems in transferring funds. Once he was able to transfer such funds they were more than ample to, not only pay his tuition fees, but to support him during the continued period of his study.

16. Therefore, whilst the Appellant was unable to satisfy the specified requirements at the time of the application, he quite clearly had the funds

available to him at the time, although he was unable to produce the evidence to show it. The judge took into account the factual circumstances and the fact that the Appellant could not satisfy the Immigration Rules because of Section 85A of the Nationality, Immigration and Asylum Act 2002 and the judge took this into account in assessing proportionality.

17. The judge properly directed herself following Patel and Nasim, namely that private life considerations would not usually give rise in themselves to a right protected under Article 8. The judge stated the limited utility of Article 8 in private life cases set out in Patel and Nasim. Therefore, she appreciated the situation the Appellant was in.

18. The judge properly applied Section 117B of the Nationality, Immigration and Asylum Act 2002 in looking at the weight to be attached to the public interest. She found that the weight to be attached was reduced by the fact that the Appellant did in fact have sufficient funds in order to satisfy the Immigration Rules, but for unfortunate reasons he had been unable to produce the documents to show that, at the time of his applications. Since he has more than sufficient funds he would not be a drain on the public purse and he had sufficient English language ability such that the weight to be attached to the public interest was reduced. There was no error of law in the judge's application of section 117B.

19. The judge quite clearly found the case was one which was finely balanced and, having properly reduced the weight to be attached to the public interest, found that the disruption to his private life did outweigh the public interest in maintaining immigration control in the economic interests of the country. On the particular facts of the Appellant's case, she found that this case could be distinguished from Nasim in that the Appellant was not seeking a further opportunity to seek post-study work, but was merely seeking to continue his course for a further few months to enable him to complete his degree.

20. I appreciate Mr Tufan's point that private life cases have limited utility when one reads the case of Patel. However, it is not the case that no private life student case could in fact succeed on Article 8 grounds and it is quite clear that this case is an exceptional one and one in which the judge properly considered all relevant factors.

21. On the facts of this case, the Appellant will complete his exams on 18th May 2016 and complete his course at the end of June, and that again was another factor which the judge was entitled to take into account and she did so.

22. In conclusion, the judge's finding that on the particular facts of this case the Appellant's personal circumstances outweighed the public interest were open to her on the evidence. She clearly identified the limited utility of private life cases such as this, but found that the public interest was reduced in properly applying section 117B. She balanced all relevant

factors and found that the significant disruption caused to this Appellant was sufficient to amount to a disproportionate interference with his right to private life.

23. Accordingly, I find that there was no error of law in the judge's decision to allow the appeal on Article 8 grounds. The judge was entitled to look at Article 8 outside the Immigration Rules and she took into account all relevant factors in her proportionately assessment. Her conclusion was one which was open to her on the evidence which was before her. The Respondent's appeal is dismissed.

Notice of decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed Date: 25th May 2016

Upper Tribunal Judge Frances